

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JASON ALLEN MAGGARD,

Petitioner,

No. CIV S-04-2196 GEB KJM P

vs.

JEANNE S. WOODFORD, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prison inmate proceeding pro se with a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his Placer County convictions for evading an officer while driving in disregard for safety and assault with a deadly weapon. He raises two grounds: the trial court erred in allowing a police officer to describe some of petitioner's actions as volitional, and the trial court erred in failing to give a specific unanimity instruction.

I. Factual and Procedural Background

The state Court of Appeal's recitation of the facts of the offense fairly reflects the record:

On July 22, 2000, Sacramento Police Officer Richard Baughman was traveling on Auburn-Folsom Road, near its intersection with Horseshoe Bar Road. He was on a marked police motorcycle and in full uniform.

1       Baughman noticed a line of stopped vehicles northbound on  
2       Auburn-Folsom Road, which were waiting for three children,  
3       ranging in ages six through nine, to cross the street. In his  
4       peripheral vision, Baughman saw another vehicle, which was  
5       moving very fast, approaching the stopped vehicles.

6       Officer Baughman saw that the vehicle was a white Chevrolet  
7       pickup truck, traveling at perhaps 75 miles per hour (mph). As it  
8       approached the stopped traffic, the truck crossed over the double  
9       yellow line into the oncoming (southbound) lane. Baughman  
10       yelled as loudly as he could for the children to stop. The children  
11       responded by stopping in the middle of the street. The officer then  
12       made eye contact with defendant, who was driving the white  
13       pickup. Defendant's truck accelerated as it raced passed [sic] the  
14       children, missing them by about five feet.

15       Baughman activated his siren and high-beam headlights and began  
16       a high speed pursuit of defendant northbound on Auburn-Folsom  
17       Road, reaching speeds close to 100 mph. Near the intersection of  
18       Whiskey Bar Road, defendant's truck abruptly shifted its weight  
19       and swerved to the left across the center line, narrowly missing a  
20       southbound vehicle and forcing it off the road to the bottom of an  
21       embankment. Near the intersection of King Road, defendant again  
22       crossed the center line, narrowly missing a southbound vehicle and  
23       also forcing it off the road. Except when he drove passed [sic] the  
24       children and veered toward each of the two oncoming vehicles,  
25       defendant stayed in his lane of traffic and did not cross the center  
26       line.

      As defendant approached a sweeping curve near Kingmont Road,  
the truck's wheels locked and it skidded off the road, coming to  
rest against a wooden rail fence. The occupants promptly began  
throwing beer bottles out of the truck. With the assistance of two  
backup officers, Baughman took defendant and his two passengers  
into custody.

      At the time of his arrest, defendant had two outstanding felony  
bench warrants for failure to complete his work project.

Lodged Document D, Appendix A (Lodg. Doc., App.) at 1-3.

      In the state Court of Appeal, petitioner raised six challenges to his conviction.  
Lodg. Doc. A. His Petition for Review filed in the California Supreme Court contained only two  
issues. Lodg. Doc. D.

      Petitioner's original petition in this court was dismissed because petitioner named  
the wrong respondent. See Docket No. 4. His amended petition contained the six claims

presented to the state Court of Appeal; the court recommended that the petition be dismissed because it contained both exhausted and unexhausted claims. Docket No. 18. The district court declined to adopt the recommendations and returned the case to this court for consideration in light of Rhines v. Weber, 544 U.S. 269 (2005). Docket No. 21. Ultimately, however, this court recommended that petitioner's motion for a stay of the proceedings to permit exhaustion of the remaining claims be denied, a recommendation upheld by the district court. Docket Nos. 25, 29. The case has proceeded on the two exhausted claims.

## II. Standards Under The AEDPA

An application for a writ of habeas corpus by a person in custody under a judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). Federal habeas corpus relief also is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (referenced herein in as "§ 2254(d)" or "AEDPA"). See Ramirez v. Castro, 365 F.3d 755, 773-75 (9th Cir. 2004) (Ninth Circuit affirmed lower court's grant of habeas relief under 28 U.S.C. § 2254 after determining that petitioner was in custody in violation of his Eighth Amendment rights and that § 2254(d) does not preclude relief); see also Lockyer v. Andrade, 538 U.S. 63, 70-71 (2003) (Supreme Court found relief precluded under § 2254(d) and therefore did not address the merits of petitioner's Eighth Amendment claim).<sup>1</sup> Courts are not required to

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<sup>1</sup> In Bell v. Jarvis, 236 F.3d 149, 162 (4th Cir. 2000), the Fourth Circuit Court of Appeals held in a § 2254 action that "any independent opinions we offer on the merits of constitutional claims will have no determinative effect in the case before us . . . At best, it is constitutional dicta." However, to the extent Bell stands for the proposition that a § 2254 petitioner may obtain

1 address the merits of a particular claim, but may simply deny a habeas application on the ground  
 2 that relief is precluded by 28 U.S.C. § 2254(d). Lockyer, 538 U.S. at 71 (overruling Van Tran v.  
 3 Lindsey, 212 F.3d 1143, 1154-55 (9th Cir. 2000) in which the Ninth Circuit required district  
 4 courts to review state court decisions for error before determining whether relief is precluded by  
 5 § 2254(d)). It is the habeas petitioner's burden to show he is not precluded from obtaining relief  
 6 by § 2254(d). See Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

7 The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are  
 8 different. As the Supreme Court has explained:

9 A federal habeas court may issue the writ under the "contrary to"  
 10 clause if the state court applies a rule different from the governing  
 11 law set forth in our cases, or if it decides a case differently than we  
 12 have done on a set of materially indistinguishable facts. The court  
 13 may grant relief under the "unreasonable application" clause if the  
 14 state court correctly identifies the governing legal principle from  
 15 our decisions but unreasonably applies it to the facts of the  
 particular case. The focus of the latter inquiry is on whether the  
 state court's application of clearly established federal law is  
 objectively unreasonable, and we stressed in Williams [v. Taylor],  
 529 U.S. 362 (2000)] that an unreasonable application is different  
 from an incorrect one.

16 Bell v. Cone, 535 U.S. 685, 694 (2002). A state court does not apply a rule different from the  
 17 law set forth in Supreme Court cases, or unreasonably apply such law, if the state court simply  
 18 fails to cite or fails to indicate an awareness of federal law. Early v. Packer, 537 U.S. 3, 8  
 19 (2002).

20 The court will look to the last reasoned state court decision in determining  
 21 whether the law applied to a particular claim by the state courts was contrary to the law set forth  
 22 in the cases of the United States Supreme Court or whether an unreasonable application of such  
 23 law has occurred. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court fails

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 25 relief simply by showing that § 2254(d) does not preclude his claim, this court disagrees. Title  
 26 28 U.S.C. § 2254(a) still requires that a habeas petitioner show that he is in custody in violation  
 of the Constitution before he or she may obtain habeas relief. See Lockyer, 538 U.S. at 70-71;  
Ramirez, 365 F.3d at 773-75.

1 to give any reasoning whatsoever in support of the denial of a claim arising under Constitutional  
2 or federal law, the Ninth Circuit has held that this court must perform an independent review of  
3 the record to ascertain whether the state court decision was objectively unreasonable. Himes v.  
4 Thompson, 336 F.3d 848, 853 (9th Cir. 2003). In other words, the court assumes the state court  
5 applied the correct law, and analyzes whether the decision of the state court was based on an  
6 objectively unreasonable application of that law.

7           It is appropriate to look to lower federal court decisions to determine what law has  
8 been "clearly established" by the Supreme Court and the reasonableness of a particular  
9 application of that law. See Duhaime v. Ducharme, 200 F.3d 597, 598 (9th Cir. 1999).

10 III. Baughman's Testimony

11           On August 29, 2001, the defense filed a motion in limine, seeking to exclude  
12 Baughman's testimony that petitioner intentionally steered the truck toward two cars, intended  
13 that the two cars collide with fixed objects, and intended to cause an accident so that Baughman  
14 would stop to assist any one injured. CT 111-112.

15           The trial court held a hearing on the motions in limine and heard Baughman's  
16 testimony. RT 54-65. It ruled that Baughman had "sufficient expertise into the characteristics of  
17 vehicles at high speed maneuvering and as to the behavior of those being pursued in high speed  
18 chases he would qualify as an expert on those." The court also found that this information was  
19 outside the experience of the average juror, so that expert testimony would aid the trier of fact.  
20 RT 65-66.

21           Thereafter, Baughman testified that although petitioner swerved several times  
22 during the pursuit, he did not lose control of the truck and that the movements were intentional.  
23 RT 131, 139, 183. He also testified that some of petitioner's maneuvers appeared to be an  
24 attempt to run oncoming cars off the road. RT 129.

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1 The Court of Appeal rejected this claim of error:

2 The [trial] court did not abuse its discretion in qualifying  
3 Baughman as an expert on whether defendant's turning movement  
4 into oncoming vehicles was intentional. Baughman had extensive  
5 experience as a traffic officer; he had special training on accident  
6 reconstruction and had personally been involved in over 100 high-  
7 speed chases. His opinion that defendant's swerving movement  
8 was volitional was based on technical observations not within the  
9 capability of the ordinary layperson, such as the condition of the  
10 tires and the roadway, the slack in the steering, and the change in  
11 the loading and suspension of [the] swerving vehicle.

12 Contrary to defendant's suggestion, Baughman was not testifying  
13 as to defendant's state of mind. The officer was simply applying  
14 his experience and observations to give an opinion as to whether  
15 the turning movement of defendant's truck was caused by the  
16 volitional action of the driver rather than by external factors such  
17 as skidding or loss of control. Baughman was not asked for, nor  
18 did he give, an opinion on the speculative subject of defendant's  
19 thought processes during the high-speed chase.

20 Defendant also claims it was improper for the officer to opine that,  
21 with respect to the first vehicle, defendant's movement was an  
22 "attempt to run [it] off the road," an opinion partially based on his  
23 experience that fleeing suspects sometimes use such diversionary  
24 tactics to avoid capture. He asserts that Baughman was unqualified  
25 to give such an opinion, because it was derived solely from  
26 conversations with unidentified suspects, not on any scientifically  
reliable data.

It appears that Baughman's testimony that defendant attempted to  
run one of the vehicles off the road strayed beyond the permissible  
scope of the court's ruling on the motion in limine. The court  
made clear that Baughman was qualified to express an opinion on  
whether "the maneuver by [defendant] was caused by some  
external force or was volitional on his part," and could testify  
concerning the "behavior of those being pursued in high speed  
chases." Nevertheless, all parties agreed that Baughman would not  
be asked whether defendant "intended to turn into oncoming  
vehicles." To the extent that Baughman exceeded the scope of the  
court's in limine ruling, however, defendant waived any claim of  
error by failing to object and move to strike the remark.

In any event, Baughman's opinion that defendant was attempting to  
run one of the vehicles off the road did not constitute prejudicial  
error. The evidence was clear that defendant was driving  
erratically and at exceptionally high speeds while attempting to flee  
from a uniformed motorcycle officer. The only time he crossed the  
center line was to swerve at oncoming vehicles. Even without  
Baughman's opinion, the jury could easily conclude that defendant

1 intentionally steered his truck toward oncoming traffic in an  
2 attempt to create a diversion that would facilitate his escape. It  
3 was miraculous that no one was killed or seriously injured as a  
4 result of defendant's reckless driving. We conclude the jury would  
5 have returned the same verdict with or without Baughman's  
6 remark.

7 Lodg. Doc. at 6-8.

8 Generally, a state court's evidentiary ruling is not subject to federal habeas review  
9 unless the ruling violates federal law, either by infringing upon a specific federal constitutional or  
10 statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by  
11 due process. See Pulley v. Harris, 465 U.S. 37, 41 (1984); Jammal v. Van de Kamp, 926 F.2d  
12 918, 919-20 (9th Cir. 1991). Petitioner does not argue that the admission of this testimony  
13 violated a specific constitutional provision, but rather that it rendered his trial fundamentally  
14 unfair.

15 This court cannot say that the state court acted unreasonably in rejecting this claim  
16 of error: neither Baughman's opinion that petitioner was in control of the vehicle when it  
17 swerved at the other cars or his testimony that petitioner was attempting to cause an accident in  
18 order to short-circuit the pursuit rendered petitioner's trial fundamentally unfair. Baughman's  
19 purely factual description of petitioner's driving provided the following information for the jury:  
20 a number of cars were stopped at an intersection in both the direct lane of travel and the left turn  
21 lane, to allow some children to cross the street, RT 94, 96; petitioner approached the intersection  
22 at a speed of 75 miles per hour, although the posted speed for that portion of Auburn-Folsom  
23 Road was 45 miles per hour, RT 95, 111; instead of stopping behind the other cars, petitioner  
24 crossed the double yellow line into the opposite lane to bypass the stopped cars and pass through  
25 the intersection, RT 97; petitioner accelerated through the intersection, coming to within five feet  
26 from the children, RT 98, 100; Baughman, in uniform, made eye contact with petitioner, who  
looked startled, RT 99; Baughman activated the lights and siren on his motorcycle, but petitioner  
did not stop, RT 99, 112; Baughman began a pursuit, sounding his air horn on occasion and

1 though petitioner did slow down to about 65 miles per hour to take a curve, he did not stop,  
 2 RT 115-117; when the road became straighter, petitioner exceeded 70 miles per hour again, RT  
 3 122; petitioner crossed the double yellow line into oncoming traffic, missing an oncoming  
 4 vehicle by about five feet and causing it to veer off the road, RT 122-124; petitioner again slowed  
 5 to about 65 miles per hour on curves, accelerating to 90 miles per hour on the straightaway and  
 6 had no problem staying in his lane, RT 126; petitioner crossed the double yellow line a second  
 7 time, again causing an oncoming car to veer off the road, RT 127-128, 136; there were no  
 8 obstructions or hazards in petitioner's direction of travel when he crossed the double yellow line  
 9 on these two occasions, RT 128, 141; eventually, petitioner's wheels locked as he braked for a  
 10 curve and he skidded off the road and into a fence, RT 145. Baughman's two opinions—that  
 11 petitioner did not lose control of the truck when he crossed the double yellow line and that these  
 12 movements were attempts to force the oncoming vehicles off the road—did not render the trial  
 13 fundamentally unfair in light of the overwhelming evidence of petitioner's reckless driving and  
 14 traffic violations.<sup>2</sup>

15 In addition, the jury was instructed that it was "not bound by an [expert's]  
 16 opinion. Give each opinion the weight you think it deserves. You may disregard any opinion if  
 17 you find it to be unreasonable." RT 291; CT 165. Compare Engesser v. Dooley, 457 F.3d 731  
 18 (8th Cir. 2006) (even though officer opined that petitioner was lying when he gave his statement,  
 19 error was harmless because jury was instructed it was sole judge of credibility). The Court of  
 20 Appeal did not apply constitutional law in an unreasonable fashion in rejecting this claim.

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23 <sup>2</sup> The Court of Appeal found that petitioner did not preserve his objection to Baughman's  
 24 opinion that petitioner was attempting to force the other cars off the road. Lodg. Doc. D, App. A  
 25 at 7. Respondent argues that this claim is thus procedurally defaulted. This court chooses not to  
 26 address the question of default, but rather resolves the claim on its merits. See Lambrix v.  
Singletary, 520 U.S. 518, 525 (1997) (a district court may reach the merits of a habeas  
 petitioner's claim where, as here, the merits are "easily resolvable against the petitioner whereas  
 the procedural-bar issue involve[s] complicated issues of state law." ).

1 IV. Unanimity Instruction

2 Petitioner was convicted of violating California Vehicle Code section 2800.2,  
3 which makes a driver's willful and wanton disregard for the safety of persons or property while  
4 fleeing a police officer a felony. Subdivision (b) of this code section provides:

5 For purposes of this section, a willful or wanton disregard for the  
6 safety of persons or property includes, but is not limited to, driving  
7 while fleeing or attempting to elude a pursuing peace officer during  
8 which time either three or more violations that are assigned a  
9 traffic violation point count under Section 12810<sup>3</sup> occur, or damage  
10 to property occurs.

11 Cal. Veh. Code § 2800.2(b).

12 The trial court instructed the jury that:

13 The defendant is accused of having committed the crime of  
14 evading an officer with the willful disregard in Count 1.

15 The prosecution has introduced evidence for the purpose of  
16 showing that there is more than one act upon which a conviction  
17 on Count 1 may be based.

18 The defendant may be found guilty, if the proof shows beyond a  
19 reasonable doubt that he committed any one or more of the acts.

20 However, in order to return a verdict of guilty to Count 1, all jurors  
21 must agree that he committed the same act. It is not necessary that  
22 the particular act agreed upon be stated in your verdict.

23 RT 332-333; CT 178. The jury was also instructed on the potential Vehicle Code violations  
24 upon which the jury could base its verdict: violations of California Vehicle Code section 22350,  
25 the basic speed law, and section 21460, which defines the circumstances in which a driver may  
26 cross over a double yellow line in the middle of the road. RT 293-295; CT 171-172.

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23 <sup>3</sup> This Vehicle Code section lists a number of traffic violations and their point values  
24 and includes a catch-all provision: "(f) . . . any other traffic conviction involving the safe  
25 operation of a motor vehicle upon the highway shall be given a value of one point."  
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1 On appeal, petitioner argued that the trial court was required to give a more  
 2 specific unanimity instruction because the statute can be violated by driving with willful or  
 3 wanton disregard, committing multiple traffic violations during the pursuit, or causing property  
 4 damage.<sup>4</sup> The Court of Appeal rejected this claim:

5 [D]efendant maintains that to the extent the rule [rejecting the need  
 6 for a specific unanimity instruction when there are alternative ways  
 7 in which an offense may be committed] prevails in California, it is  
 8 inconsistent with . . . *Schad v. Arizona* (1991), 501 U.S. 624, 630-  
 9 633 [115 L.Ed.2d. 555, 564-566], wherein the court held that due  
 10 process precludes a state from punishing a criminal defendant  
 11 under a statute so broadly defined that it is fundamentally unfair.  
 12 However, the California Supreme Court has already thwarted such  
 13 a claim. In *People v. Santamaria* (1994) 8 Cal.4th 903, 918-919,  
 14 the court stated that California's version of the unanimity rule,  
 15 requiring juror unanimity only on the issue of whether the  
 16 defendant is guilty of the charged crime irrespective of whether  
 17 there is agreement on which of several theories of guilt apply,  
 18 "passes federal constitutional muster."

19 Lodg. Doc. D, App. A at 13-14.

20 In *Schad v. Arizona*, 501 U.S. 624, 629 (1991), a defendant was charged with first  
 21 degree murder on two theories: that the murder was committed during the course of a robbery or  
 22 that it was premeditated and deliberate. He contended that the jury should have been instructed

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<sup>4</sup> In this case, however, the court did not instruct the jury that property damage could be the basis of the felony evading charge. RT 294; CT 171.

1 that it must unanimously agree on the theory of first degree murder supporting his conviction.

2 The Supreme Court rejected the claim:

3           Petitioner's jury was unanimous in deciding that the State had  
4           proved what, under state law, it had to prove: that petitioner  
5           murdered either with premeditation or in the course of committing  
6           a robbery. The question still remains whether it was  
7           constitutionally acceptable to permit the jurors to reach one verdict  
8           based on any combination of the alternative findings. If it was,  
9           then the jury was unanimous in reaching the verdict, and  
10          petitioner's proposed unanimity rule would not help him. If it was  
11          not, and the jurors may not combine findings of premeditated and  
12          felony murder, then petitioner's conviction would fall even without  
13          his proposed rule, because the instructions allowed for the  
14          forbidden combination.

15           In other words, petitioner's real challenge is to Arizona's  
16           characterization of first-degree murder as a single crime as to  
17           which a verdict need not be limited to any one statutory alternative,  
18           as against which he argues that premeditated murder and felony  
19           murder are separate crimes as to which the jury must return  
20           separate verdicts.

21 Id. at 630-31. The Court concluded that, under Arizona law, premeditation and the commission  
22 of a felony in conjunction with the murder were means of satisfying the mens rea requirement  
23 and ultimately found that permitting jurors to rely on both in reaching a unitary verdict did not  
24 violate due process. Id. at 639. It cautioned, however,

25           [i]f . . . two mental states are supposed to be equivalent means to  
26           satisfy the *mens rea* element of a single offense, they must  
27           reasonably reflect notions of equivalent blameworthiness or  
28           culpability, whereas a difference in their perceived degrees of  
29           culpability would be a reason to conclude that they identified  
30           different offenses altogether. Petitioner has made out no case for  
31           such moral disparity in this instance.

32 Id. at 643. The Court also found there was substantial historical and statutory precedent for  
33 equating the mental states of premeditated murder and felony murder. Id. at 640.

34           In this case, petitioner suggests there is no equivalent blameworthiness between  
35 what he identifies as the mens rea requirements of wantonness and strict liability, based on  
36 wanton driving itself or the commission of qualifying traffic offenses. Am. Pet. (Docket No. 20-

2) at 16.<sup>5</sup> He has provided little analysis of the question, however, either by examining the statutes themselves or other precedent to suggest the problems with the manner in which the California legislature defined the offense. As the Schad court observed, in such a case, “the state legislature’s definition of the elements of the offense is usually dispositive.” Id. at 639 (internal citation, quotation omitted). In light of the general primacy of a state legislature’s definitions, petitioner cannot show that the state court applied federal law unreasonably in rejecting this claim of error.

IT IS THEREFORE RECOMMENDED that the petition for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: March 17, 2008.

  
U.S. MAGISTRATE JUDGE

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<sup>5</sup> Page references are to those assigned to the document by the court’s CM/ECF system.